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IN THE

SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

No. ~~80-997~~ 80-605

STATE OF MISSOURI,

Petitioner/Respondent,

v.

ROLLAN ANTHONY WILLIAMS,

Respondent/Petitioner.

RESPONSE TO CROSS-PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Whether it is constitutionally permissible for a prosecuting attorney to recommend a higher sentence of punishment after a trial by a jury and a guilty verdict then that originally recommended by the prosecutor prior to trial in exchange for a plea of guilty?

Whether it is permissible for a trial judge not to allow a defendant to amend his peremptory strikes after both counsel for the state and defense had exercised their strikes and a jury had been seated but not sworn? Further, whether it is permissible to require a defendant on appeal to show that he was prejudiced by the trial court's refusal to allow said defendant to amend his peremptory challenges after they had been exercised?

PARTIES

In the Supreme Court of Missouri, the parties were as follows: Rollan Anthony Williams, appellant, and State of Missouri, respondent.

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IN THE

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No. 80-997

ROLLAN ANTHONY WILLIAMS,

Cross-Petitioner,

v.

STATE OF MISSOURI,

Respondent.

RESPONSE TO CROSS-PETITION FOR CERTIORARI

OPINION BELOW

Cross-petitioner (hereinafter referred to as "petitioner") was convicted by a jury of the offenses of two counts of first degree robbery and two counts of armed criminal action, on April 24, 1979. On June 1, 1979, petitioner filed a motion for new trial which was denied on July 27, 1979. On August 2, 1979, petitioner appealed his convictions to the Supreme Court of Missouri, which affirmed those convictions at State v. Williams, 606 S.W.2d 777 (Mo. 1980). A copy of this opinion appears in Appendix A, pages 1 through 7, of the petitioner's cross-petition for writ of certiorari.

Petitioner subsequently filed in the Supreme Court of Missouri a motion for rehearing. The motion and application were denied by that court on November 12, 1980. A copy of this ruling appears in petitioner's Appendix A, page 8, of his cross-petition.

JURISDICTION

Petitioner claims the violation of his rights, guaranteed to him by the Sixth Amendment and the Fourteenth Amendment of the United States Constitution, and therefore invokes this Court's jurisdiction under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner urges violations of his Sixth and Fourteenth Amendment rights guaranteed by the federal constitutional. The Sixth Amendment reads:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Fourteenth Amendment, Section 1, provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws."

Petitioner has included § 546.180, RSMo Supp. 1980, in his Appendix B. However, the relevant Missouri statute at the time of petitioner's trial was § 546.180, RSMo Supp. 1977, which read, in relevant part, as follows:

"(1) If the offense charged is punishable by death or by imprisonment in the penitentiary for life, the state shall have the right to challenge six and the defendant twelve, and no more."

STATEMENT OF FACTS

On the evening of April 28, 1978, at around 6:45 p.m., petitioner entered Hartwig's Tavern, sat at the bar, and ordered a bottle of beer (Transcript on appeal in cause no. 61595, page 81; hereinafter referred to as Tr.). Several minutes later, petitioner's accomplice approached the bar and ordered a glass of water (Tr. 82). Shannon Schultz, the bartender-manager, was the only employee on duty at that time (Tr. 78, 79). The petitioner ordered another beer (Tr. 83), and shortly after that, came to the end of the bar and pointed a gun at Schultz (Tr. 84, 123). Petitioner's accomplice then also produced a weapon, and forced two male patrons to stand against the wall (Tr. 123, 135). Another customer then came out of the restroom, and was forced up against the wall with the other two men (Tr. 124, 137). These three male patrons were subsequently placed in the restroom after the accomplice of petitioner had taken the wallet from one of the male victims (Tr. 124, 136, 138).

In the meantime, petitioner grabbed a paper bag and forced Schultz to empty the contents of the cash register into the bag (Tr. 86). After petitioner took some money from a drawer, he forced Schultz into a backroom (Tr. 87). When the victim, Schultz, told the petitioner that there was no more money, petitioner threatened to "blow her head off" if she did not tell the truth (Tr. 88). Schultz then showed petitioner where the rest of the money was, and after searching through her underwear for more money, petitioner forced Schultz to join to the other men in the restroom (Tr. 88, 89, 93).

Shortly after petitioner and his accomplice had left the scene of the crime, the victim summoned help, and the police arrived (Tr. 94, 124). Fingerprint samples were taken from a

bottle of beer on the bar where petitioner was sitting (Tr. 105, 150, 165, 166). A palmprint taken from that beer bottle at the scene was identified as petitioner's (Tr. 176, 180, 191).

Several weeks after the robbery, on May 18, 1978, the police took Schultz and one of the male victims to a police station to view a lineup (Tr. 106, 125, 142). Schultz positively identified the petitioner at the lineup and in- court as her assailant (Tr. 108, 110). The male victim identified petitioner from a profile view in the lineup as the robber (Tr. 127), although he could not give a "one-hundred percent" positive identification of petitioner (Tr. 129).

Petitioner presented two witnesses, and one of the witnesses testified that, at around the time of the crime on the night in question, petitioner and a friend were at her house (Tr. 212).

Petitioner's first trial resulted in a mistrial when the jury could not return a verdict (Tr. 14). Subsequently, a second trial was held, which resulted in the conviction of petitioner currently under attack in the present action. Prior to the commencement of trial, and after the voir dire of the jury by defense counsel and the state was completed, the record indicates that both counsel for defense and state gave their strikes to the bailiff (Tr. 69, 70). A twelve member jury was then seated (Tr. 70), when defense counsel approached the bench, and the following occurred:

> "MR. GORLA: Judge, at this point I'm going to advise the court that when I copied my strikes from my list to the list I gave to the Bailiff, that I made a mistake. That I intended to strike the # 4 juror, Mr. Edward McKeena and that because of the error on my part I didn't write it down on my list and consequently I strike an extra person. At this point I'd ask leave of court that I could amend my strikes and strike # 4 and also take off one of the strikes that I gave to the Bailiff.
>
> THE COURT: It will be overruled.

MR. GORLA: Okay, Judge." (Tr. 71).

The jury was then sworn (Tr. 71), and the trial commenced.

As previously mentioned, the petitioner was convicted of two counts of first degree robbery and two counts of armed criminal action based upon the foregoing evidence (Tr. 229, 230). The trial court was to fix the petitioner's punishment, pursuant to finding that petitioner was subject to Missouri's Second Offender Act[1] (Tr. 197). Prior to fixing punishment, defense counsel indicated that the prosecutor had offered petitioner four concurrent fifteen year sentences for the aforementioned charges upon a plea of guilty, and defense counsel now felt that petitioner should not be sentenced to any term of years longer than fifteen years, as to do otherwise, would punish the petitioner for exercising his constitutional right to a jury trial (Tr. 235, 236). The prosecutor indicated that the court was not involved in any pretrial negotiations between the parties, and that the increased recommendation of life imprisonment for each offense was based upon information included in a pre-sentence investigation report which the state was not previously aware of (Tr. 236). The court then sentenced petitioner to four concurrent terms of life imprisonment for the aforementioned offenses (Tr. 237).

---

[1] § 556.280, RSMo 1969, repealed Laws 1977, in effect at the time of petitioner's trial.

ARGUMENT

I.

On his first point for issuance of a writ of certiorari, petitioner contends that prosecutorial vindictiveness denied him due process of law under the Fourteenth Amendment. Specifically, petitioner alleges that, after the first trial resulted in a mistrial, the prosecutor offered petitioner four, fifteen-year concurrent sentences on the four aforementioned offenses in exchange for a plea of guilty. The petitioner refused said offer, went to trial, was convicted, and at the time of sentencing, the prosecuting attorney then recommended life imprisonment. Petitioner contends that this conduct displayed prosecutorial "vindictiveness" that amounted to a due process violation under Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974), which should cause a reversal of his conviction. Respondent contends that no constitutional deprivation was displayed by the conduct of the prosecuting attorney in the case at hand, and the writ of certiorari should not issue.

The record does not support the petitioner's claim that the prosecutor's recommendation of life sentence was a vindictive action to "punish" the petitioner for exercising his right to a jury trial and refusing the plea offer of the prosecuting attorney. At the time of sentencing, the prosecuting attorney indicated that he had read the pre-sentence investigation report which made the prosecutor aware, for the first time, of certain factors about the petitioner's personality which would make a sentence of life imprisonment very appropriate for the petitioner (Tr. 236). Therefore, the record does not support the petitioner's allegation of prosecutorial vindictiveness, but rather indicates that the prosecutor's recommendation for sentencing was based upon the pre-sentence investigation report.

Even assuming arguendo that the state's recommendation was raised because the petitioner rejected the pretrial plea bargain

offer, the petitioner's claim is totally devoid of any constitutional merit under this court's recent holding in Bordenkircher v. Haynes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). In Bordenkircher, a defendant also claimed he was unconstitutionally penalized for exercising his right to a jury trial where, after he refused the prosecutor's plea bargain offer of a five-year sentence for forgery, he was re-indicted as a habitual offender and received a mandatory life sentence upon conviction by a jury. This court, rejecting the defendant's due process claim that he was unconstitutionally punished for exercising his right to a jury trial, stated that:

> "[I]n the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecutor's offer." 434 U.S. at 363.

Other federal cases have also held that a greater sentence received after a defendant exercises his right to a trial and is convicted than would have been given upon an exchange for a plea bargain is constitutionally permissible, and does not punish an accused for exercising that right to a trial. Corbitt v. New Jersey, 439 U.S. 212, 221-222, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978); United States v. Gardner, 611 F.2d 770, 773 (9th Cir. 1980); Cole v. Wainwright, 614 F.2d 67, 69 (5th Cir. 1980); and United States v. Litton Systems, Inc., 573 F.2d 195, 199 (4th Cir. 1978), cert. den. in 439 U.S. 828.

In fact, the action taken by the prosecutor in the case at bar was much less serious in terms of result to the petitioner than the prosecutor's action in Bordenkircher. In Bordenkircher, the prosecutor took direct action within his control by re-indicting the defendant as an habitual offender to insure that the defendant received a more severe punishment by not accepting the plea of guilty. In the case at bar, the prosecutor took no direct action within his control to insure that the petitioner received a more substantial penalty. All the prosecutor did was recommend life imprisonment at the time of sentencing. How-

ever, the trial court was the one who fixed punishment, and of course, the court was free to accept or reject the prosecutor's offer and decide sentence independent of any recommendation. Furthermore, were the petitioner correct in his assertion that his constitutional rights were violated by the prosecutor's action, then any defendant would be ill-advised to ever accept a guilty plea, because if he went to a trial and was convicted, he could never receive any more punishment than that that was offered by accepting a plea of guilty. This would essentially destroy the plea-bargaining system, which is an accepted method in our criminal justice system to process criminal cases. Bordenkircher v. Hayes, 434 U.S. at 361. Petitioner's first ground clearly does not state a claim for the issuance of a writ of certiorari, and this point should be dismissed.

II.

Petitioner's second claim is also devoid of constitutional merit, and should be dismissed. Petitioner has two parts to his second claim in this cross-petition for certiorari: (1) that he was denied his unrestricted right to peremptory challenges, and this has constitutional underpinnings in the case of Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 58 L.Ed.2d 466 (1965); and (2) that he should not be required to show prejudice on appeal from the trial court's refusal to permit him to change his peremptory challenges after he had exercised them.

Respondent is not certain whether petitioner has raised a question of constitutional import or rather one controlled by state law and procedure. While peremptory challenges are unquestionably a very important proponent of a criminal trial, it is not clear that the use or denial of the use of these challenges has reached constitutional proportions. See Stilson v. United States, 250 U.S. 583, 40 S.Ct. 28, 63 L.Ed. 1154 (1919); United States v. Vargas, 606 F.2d 341, 346 (1st Cir. 1979). However, if a defendant were arbitrarily or capriciously deprived of the use of his peremptory challenges that were

provided by state law, he would have a viable due process claim which could be reviewed by this court. Respondent submits that, on the basis of the record in the case at hand, no constitutional question is raised.

Respondent notes at the outset that petitioner is bound by the record of his trial. However, in his factual statement, at page 6, petitioner paints a far different picture than that which appears from the transcribed record of his trial. In his factual statement, petitioner alleges that a venireman, McKenna, was the second member of the jury panel called and seated in the jury box, and at that point, petitioner approached the bench and requested to amend his peremptory strikes to include McKenna. A far different picture of this situation appears from the relevant portions of the record:

> "MR. GORLA: Okay, I want to thank you everybody very much. I don't have any other questions, Judge.
>
> THE COURT: Thank you. Do you have anything further?
>
> MR. WALSH: I have nothing further, Your Honor. The panel is acceptable to the State.
>
> THE COURT: Gentlemen, we'll take a recess while you make your strikes. We'll take about a ten minute recess. We'll be in temporary recess.
>
> * * *
>
> (The following strikes were given the Bailiff:)
>
> State's Strikes:
>
> # 9 Hayles
>
> # 18 Greer
>
> # 20 Harris
>
> #23 Ruby
>
> #28 Dacus
>
> # 30 Townsend
>
> Alt: # 35 Lavely
>
> \- - - -
>
> Defendant's Strikes:

1 Caruso

3 Byers

5 Odem

7 Nibeck

11 Zenner

15 Reek

17 Melson

19 Long

21 Barlow

22 Bond

25 Bangert

31 Esteep

Alt: # 32 Lehmbeck

34 Mason

* * *

JURY SEATED

The following jury was then seated by the court (emphasis added):

2 Hoppe

4 McKenna

6 Bullington

8 Streb

10 Newsom

12 Sondermann

14 Borders

16 Warren

24 Gabbert

26 Teel

27 Thurber

29 Beauman

Alternate: # 33 Winchell

* * *

(The following proceedings then took place at the bench, out of the hearing of the jury:)

MR. GORLA: Judge, at this point I'm going to advise the Court that when I copied my strikes from

my list to the list I gave to the Bailiff, that I made a mistake. That I intended to strike the #4 juror, Mr. Edward McKenna and that because of the error on my part I didn't write it down on my list and consequently I strike an extra person. At this point I'd ask leave of court that I could amend my strikes and strike #4 and also take off one of the strikes that I gave to the Bailiff. [emphasis added].

THE COURT: It will be overruled.

MR. GORLA: Okay, Judge." (Tr. 68-71).

The record does not display that petitioner was in any way denied the exercise of his right to peremptory challenges as granted by state law. The relevant statute at the time of petitioner's trial, § 546.180(1), RSMo Supp. 1977, provided that:

"(1) If the offense charged is punishable by death or by imprisonment in the penitentiary for life, the state shall have the right to challenge six and the defendant twelve, and no more" [emphasis added].

The petitioner fully exercised his right as provided by Missouri statute, and peremptorily struck twelve members of the jury panel, listing two alternative strikes. Juror Edward McKenna was not among these strikes. The record indicates that a twelve member jury was then seated by the trial court (Tr. 70). After the jury was seated, petitioner's counsel approached the bench and informed the court of an alleged mistake, where petitioner wanted to strike juror McKenna, and that "[c]onsequently I strike an extra person" (Tr. 71). Yet, such an extra peremptory challenge would violate Missouri statute that provided for twelve peremptory strikes for the defendant, and no more." Compare United States v. Caldwell, 543 F.2d 1333 (D.C.Cir. 1974). At the bench conference, petitioner went on to tell the trial court that he would like to amend his strikes by striking McKenna and then taking off one of the other strikes which were given to the Bailiff (Tr. 71). However, there is no showing in the record that such a

procedure could viably have been done. There is no showing that the other stricken jurors were not already discharged by the court when the twelve member jury panel was seated, and even if they were, one of the jurors originally struck by the petitioner would now be placed on the jury due to the petitioner's action, and this could cause that potential juror to favor the petitioner by having that juror placed back upon the jury. For whatever the reason, the court indicated that such an amendment of the strikes could not be granted at that time. Petitioner acquiesed in that ruling, and made no attempt to expand the record on this issue, saying simply "Okay, Judge" (Tr. 71). As petitioner was freely allowed to exercise his peremptory challenges, but was merely not granted leave to correct an alleged mistake, there is no constitutional deprivation present as he was not denied arbitrarily or capriciously his right to the exercise of peremptory challenges as provided by Missouri law.

The second part of petitioner's contention raised herein is whether or not an appellate court can require a defendant to show prejudice by the trial court not allowing that defendant to amend his peremptory challenges after they have been exercised. Petitioner states that they cannot, citing dictum from Swain v. Alabama, supra, which cited Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892), stating that "The denial or impairment of the right [to peremptory challenges] is reversible error without a showing of prejudice". Swain, id. at 219. Petitioner also cites United States v. Turner, 558 F.2d 535 (9th Cir. 1977), for the proposition that error in the restriction of a defendant's exercise of his peremptory strikes is reversible without a showing of prejudice. Respondent does not quarrel with either of those propositions, but contends that Lewis and Turner are inapposite to the case at hand. In Lewis, the procedure of a United States District Court was in issue, whereby the state and defendant secretly submitted their peremptory strikes to the court at the same time,

causing the defendant to waste three peremptory strikes on jurors that were also struck by the prosecution. This procedure was held to be unduly restrictive of the defendant's right to peremptorily challenge jurors, and was reversible apart from a showing of actual prejudice. Similarly, in Turner, the District Court also did not allow a defendant to exercise one of his allotted peremptory challenges. Id. at 537. Again, the court held that error in restricting the exercise of peremptory challenges results in an automatic reversal apart from a showing of prejudice. Id. at 538.

In the case at bar, the petitioner was not in any manner restricted from the exercise of his peremptory challenges. He made twelve peremptory strikes, including two alternatives, and submitted them to the Bailiff (Tr. 69-70). The twelve member jury was then seated, and petitioner's counsel approached the bench indicating that he wanted to amend his challenges to include a strike that was not previously taken (Tr. 71). Under these circumstances, Missouri law is very clear that the ability to amend peremptory challenges after all have been exercised and before the jury is sworn, is solely within the sound discretion of the trial court. State v. Brown, 554 S.W.2d 574, 578 (Mo.App., St.L.D. 1977); State v. Blankenship, 536 S.W.2d 520 (Mo.App., Spr.D. 1976). Further, where a defendant complained that the court would not allow him to amend his strikes to include a juror that was inadvertently not struck and by the defendant, he must make a showing that another juror is available, and that prejudice would have resulted due to the trial court's refusal to allow the amendment. State v. Harris, 356 S.W.2d 889 (Mo. 1962). Upon the record of appellant's trial[2], there was absolutely no showing that

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[2]The Missouri Supreme Court was bound by the printed transcript on appeal, signed by petitioner's counsel (Tr. 244), and not on counsel's memory of what occurred at trial. State v. Bluitt, 592 S.W.2d 752 (Mo.banc 1980).

another juror was available for duty, nor was there any showing of prejudice by the court's refusal to allow petitioner to amend his strikes to include McKenna. Petitioner could not display any prejudice by the inclusion of McKenna on the twelve member jury that presided at his trial, nor did petitioner attempt to show, by way of strike for cause, that McKenna was biased or prejudiced or otherwise not qualified to serve as a juror. Under these circumstances, there was no constitutional deprivation by requiring petitioner to show prejudice in the trial court's refusal to allow him to amend his peremptory strikes to include McKenna. Compare United States v. Lepera, 443 F.2d 810 (9th Cir. 1971). Petitioner's second ground lacks constitutional merit, and is not a basis for issuance of a writ of certiorari.

CONCLUSION

WHEREFORE, respondent respectfully submits that the petitioner's cross-petition for writ of certiorari be denied as the issues raised herein do not display that petitioner was subject to any deprivation of his constitutional rights at trial.

Respectfully submitted,

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